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No. 03-633

IN THE

Supreme Court of the United States

DONALD P. ROPER, SUPERINTENDENT, POTOSI CORRECTIONAL CENTER,

Petitioner,

v.

CHRISTOPHER SIMMONS,

Respondent.

On Writ of Certiorari
To the Supreme Court of Missouri

BRIEF OF *AMICI CURIAE* JUSTICE FOR ALL ALLIANCE IN SUPPORT OF PETITIONER

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BRIEF JUSTICE FOR ALL ALLIANCE

STATEMENT OF *AMICI CURIAE* INTEREST [1]

Justice for All Alliance (JFAA) files this brief as *amici curiae* in support of Petitioner by written consent of all parties, pursuant to Rule 37.2 of the Rules of this Court.[2]

JFAA is an all volunteer not for profit organization founded in 1993. JFAA's purpose is to support victims of homicide and violent crimes through challenges that they must face on a regular basis, including victim's compensation, community outreach, trial procedures, parole and clemency hearings. JFAA provides emotional support to victims throughout the process. In addition, JFAA's mission is to act as an advocate for change in the criminal justice system to ensure that the rights of the victims and law-abiding citizens are protected.

This case involves important issues concerning the execution of juveniles that may affect the State of Texas. A decision upholding the Supreme Court of Missouri's ruling would prevent the State of Texas from bringing convicted murderers to justice by properly punishing them under Texas law. This Court has recognized that in punishing criminal offenders, the state plays a role in vindicating the rights of victims. *Johnson v. Dulles*, 509 U.S. 350, 366 (1993). JFAA has an interest in ensuring that the efforts of the State of Texas to vindicate those rights through the administration of its criminal laws are not unduly hampered. JFAA respectfully requests this Court adopt the clear objective criteria

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than the amici curiae and their members, made a monetary contribution to the preparation or submission of this brief. S. Ct. Rule 37.6.

[2] Letters of consent from both parties are on file with the Clerk of this Court.

defined by this Court evolving from state legislation over the past century as federal law and apply it to the instant case. Furthermore, to ensure that punishment is not disproportionate to the severity of the crime, the Court should focus on the moral culpability of the respondent at the time he committed premeditated murder and embrace the fundamental respect for humanity underlying the Eighth Amendment that requires the Court not group juveniles together as a class but rather acknowledge that they are all different with respect to their experience, maturity, intelligence and moral culpability.

SUMMARY OF ARGUMENT

The issue before the Court is whether the execution of a person who committed premeditated murder while under the age of eighteen constitutes "cruel and unusual punishment" in violation of the Eighth Amendment to the Constitution of the United States of America.

The Court is using the national standards of decency doctrine in a way that ignores what punishment society really deems acceptable and appropriate because it does not apply the criteria that is reflected through state legislation and defined by the Court as what factors dictate whether punishment is cruel and unusual. The time has come for the Court to adopt as federal law the clear objective criteria it has defined over the past century evolving out of state legislation to determine what punishment constitutes cruel and unusual under the Eighth Amendment.[3] The Court should require all states to apply the criteria on a case-by-case basis focusing on the moral culpability of the defendant.

The foundation of our judicial system is based on moral culpability.[4] In intentional torts and criminal law the judicial system requires a requisite mental state in order to convict

[3] Brim, Mitchel A., *The Ultimate Solution to Properly Administer the Ultimate Penalty*, 32 Sw. U. L. Rev. 275, 306 (2003).

[4] *California v. Brown*, 479 U.S. 538, 545 (1987).

one of a crime. In criminal law, specifically murder cases, punishment is imposed according to one's degree of mens rea.[5] In fact, one of the rationales for imposing the death penalty, deterrence, is directly linked to one's moral culpability because the threat of death prevents one from forming the intent to kill. The ultimate penalty is imposed on those who intend to kill, understand right from wrong and the consequences of their actions at the time of the act and nevertheless kill another human being. Juveniles are capable of understanding right from wrong and the consequences of their actions. Furthermore, they are capable of forming the requisite intent to kill to merit the death penalty. They are also capable of being deterred from forming the requisite intent as will be illustrated in the analysis of the instant case.

The Court and a majority of state legislatures have held that individual consideration is a constitutional requirement before sentencing one to death.[6] The Court needs to abide by this requirement and not group juveniles together as a class based on age. Rather, it should recognize that juvenile defendants, even those in the same age group, are shaped by individual life experiences and therefore possess different levels of maturity and make different choices. Consequently, their decisions affect their moral responsibility for a crime. This will be illustrated by looking at the similarities of Thompson, Wilkins, and Stanford and contrasting their moral culpability to that of Lee Malvo in the sniper case. What is reflected is that a fifteen, sixteen, and seventeen-year-old can

[5] Id.; *Tison v. Arizona*, 481 U.S. 137, 156 (1987) (holding that the legal system is based on the notion that the more purposeful the criminal conduct and serious the offense, the more severely it should be punished); *Eddings v. Oklahoma*, 455 U.S. 104, 116 (1982) (recognizing that the death penalty is appropriate in felony murder cases where the defendant intended to kill).

[6] *Enmund v. Florida*, 458 U.S. 782, 798 (1982) (quoting *Lockett v. Ohio*, 438 U.S. 586, 605 (1978).

be morally culpable to merit the death penalty. To ascertain the issue, a case-by-case analysis is required.

The Court should not focus solely on the states that expressly prohibit the execution of anyone under the age of 18 to decide if there is a national consensus. Rather, the Court should both consider and recognize that there is a national consensus among state legislatures to impose the death penalty on a defendant who did not intend to kill, nor killed, but was a major participant in a felony murder who knew that death was likely to occur.[7] Clearly, this indicates that society deems it acceptable to impose the death penalty on a seventeen-year-old that intended to kill and did in fact kill.

Executing the Respondent is not cruel and unusual punishment because he specifically knew it was wrong to kill, understood the consequences of his actions, and nevertheless committed a horrific premeditated murder of an innocent woman. His justification for the murder was that he knew his age would prevent him from receiving the ultimate punishment.[8] Juveniles like Simmons, need to be deterred from committing such an egregious act for the safety of society by being properly punished. The Respondent's execution furthers the goals of the death penalty because he deserves his life be taken as a result of him intentionally taking an innocent woman's life. Furthermore, it sends a message to other juveniles that when one understands the repercussions, knows right from wrong and still commits premeditated murder, he or she will receive the ultimate penalty.

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[7] *Tison v. Arizona*, 481 U.S. at 153-154 (holding that a defendant deserves the death penalty when he is a major participant in a felony murder and acts in a manner that reveals a reckless indifference to human life.).

[8] *State v. Simmons*, 944 S.W.2d 165, 169 (1997).

ARGUMENT

1. DEATH PENALTY JURISPRUDENCE DICTATES THIS COURT ADOPT THE OBJECTIVE CRITERIA THAT HAS EVOLVED OUT OF STATE LEGISLATION, APPLY IT TO THE INSTANT CASE, AND UNIVERSALLY ON A CASE-BY-CASE BASIS

This Court has defined what constitutes cruel and unusual punishment by relying on clear objective criteria that has evolved out of state legislation.

A. SENTENCING MUST BE ADMINISTERED IN A CONSISTENT AND RATIONAL MANNER

In 1972, this Court held that states may not give the sentencer unbridled discretion in deciding whether to impose the death penalty because the outcome may be based on prejudice and inflicted in an arbitrary and capricious manner.[9] In 1976, this Court invalidated a North Carolina mandatory death penalty statute because it failed to provide standards to guide the jury in its decision of whether first-degree murderers should live or die.[10] Furthermore, this Court found the statute unconstitutional because it did not allow the jury to consider relevant aspects of the convicted defendant's character, his criminal record, or the circumstances of the particular offense.[11] As a result of *Woodson*, the sentencer must now take into account the character, the record of the individual offender, and the circumstances of the particular offense before sentencing one to death.[12] Death sentences

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[9] *Furman v. Georgia*, 408 U.S. 238, 247 (1972).

[10] *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); Brim, Mitchel A., *The Ultimate Solution to Properly Administer The Ultimate Penalty*, 32 Sw. U. L. Rev. 275, p.281-282. (2002); N.C.Gen.Stat. s 14-17 (1969)

[11] See *Woodson v. North Carolina*, 438 U.S. at 309.

[12] Id. The Court finds that the fundamental respect for humanity underlying the Eighth Amendment stated in *Trop v. Dulles*, 356 U.S. 86, 100

can no longer be imposed in an arbitrary and capricious manner.

B. GUIDELINES NEED TO BE IMPLEMENTED TO IMPOSE DEATH IN A CONSISTENT AND RATIONAL MANNER

The Court in *Gregg v. Georgia* found the concerns expressed in *Furman* are best met by providing the sentencer with standards to guide its use of information relevant to the imposition of death so that the death penalty could be imposed in a consistent and rational manner.[13] It recognized that giving jury guidance in its decision-making is essential and not a novel idea.[14] The Court found Georgia's capital sentencing procedures constitutional because it required the jury to consider any mitigating or aggravating circumstances that may be supported by the evidence.[15] To impose death, the jury also had to find beyond a reasonable doubt and specify one of the statutory aggravating circumstance(s).[16] Specifying the aggravating circumstance provided an additional safeguard to ensure that a death sentence was not imposed capriciously or arbitrarily.[17] The sentencer was allowed to weigh the aggravating and mitigating factors

(1958), requires consideration of the character and record of the individual offender and the circumstances of the particular offense.

13 428 U.S. 153, 189-194 (1976).

14 Id. at 192-193. (Court stated that it would be unthinkable for juries to follow any other course in a judicial system that relies on precedent and fixed rules of law).

15 Id. at 2921; Ga.Code Ann § 27-2534.1(b)(Supp.1975); See *Williams v. Oklahoma*, 358 U.S. 576, 585 (1959)(holding that the sentencing judge is authorized, if not required, to consider all of the mitigating and aggravating circumstances involved in the crime.).

16 See *Gregg v. Georgia*, 428 U.S. at 165; Ga. Code Ann s 26-3102 & s 27-2534.1 (c)(Supp.1975).

17 See *Gregg v. Georgia*, 428 U.S. at 195.

against each other.[18] In addition, to ensure that the sentence of death was appropriate in a particular case, there was a special provision that allowed a direct review by the Supreme Court of Georgia.[19]

C. SENTENCER MUST CONSIDER RELEVANT MITIGATING FACTORS

In 1978, this Court invalidated an Ohio statute because it did not permit the sentencer to consider the defendant's minor role in the offense, age, nor absence of intent to cause death as mitigating factors.[20] Justice Blackman concurred in the plurality decision because the Ohio statute did not require, in the case of a nontriggerman such as Lockett, the sentencing authority to consider the degree of defendant's participation in the acts leading to the killing and the defendant's lack of intent to kill.[21]

D. STATUTE INVALID BECAUSE ALLOWS ARBITRARY AND CAPRICIOUS IMPOSITION OF DEATH

18 Id. at 164; Ga.Code Ann. s 27-2534.1(b)(Supp.1975).

19 Id at 166-167 (the Court considered whether any errors were committed by way of appeal, whether the sentence of death was imposed under the influence of passion or any arbitrary factor and whether the sentence of death was disproportionate to the penalty imposed in similar cases); Ga.Code Ann s 27-2537(c)(Supp.1975).

20 *Lockett v. Ohio*, 438 U.S. 586, 607-608 (1978) (holding that once a defendant is convicted of aggravated murder with at least one of the seven specified aggravating circumstances, the death penalty must be imposed unless the sentencer finds at least one of the following mitigating circumstances: "1) The victim of the offense induced or facilitated it. 2) It is unlikely that the offense would have been committed, but for the fact that the offender was under duress, coercion, or strong provocation. 3) The offense was primarily the product of the offender's psychosis or mental deficiency, though such condition is insufficient to establish the defense of insanity." Ohio Rev. Code Ann. § 2929.04 (B)(1975).

21 Id. at 616.

In 1980, this Court invalidated a Georgia statute that authorized a convicted murderer to be sentenced to death if the state proved, beyond a reasonable doubt, the offense was "outrageously or wantonly vile, horrible and inhuman."[22] The Court found the words "outrageously or wantonly vile, horrible and inhuman" too vague because it allowed the jury to impose the death penalty in an arbitrary and capricious manner.[23] This decision illustrates the Court's opinion that it is cruel and unusual punishment to sentence an individual to death without the sentence being based on clear objective standards that provide guidance so that a rational decision can be made regarding the imposition of death.[24]

E. IMPOSITION OF DEATH MUST BE LINKED TO MORAL CULPABILITY

In 1982, this Court held that the imposition of death must be linked to one's personal responsibility and moral guilt.[25] In a felony murder situation, the focus must be on the defendant's culpability, not on those who committed the robbery and shot the victim.[26] Under Florida law, Enmund could be put to death because he aided and abetted a robbery in the course of which a murder was committed.[27] Yet, Enmund did not intend to kill, attempt to kill, nor intend to facilitate a murder.[28] Rather, he was the driver of the getaway car in an armed robbery of a dwelling.[29] This Court reversed the

22 *Godfrey v. Georgia,* 446 U.S. 420, 422 (1980) (citing Ga. Code Ann §27-2534.1 (b)(7)(1978).

23 Id.

24 Id. at 428-432.

25 *Enmund v. Florida,* 458 U.S. 782, 797-800 (1982).

26 Id. at 798.

27 Id.; Fla. Stat. § 921.141(5)(f)(1981).

28 Id.

29 Id. at 784.

judgment of the Florida Supreme Court and held that putting Enmund to death for two killings he did not commit nor intend to commit did not contribute to one of the goals of the death penalty, retribution.[30]

F. SENTENCER MUST CONSIDER FAMILY HISTORY AND DEFENDANT'S ABUSE AS MITIGATING FACTORS

In 1982, this Court in *Eddings v. Oklahoma* held that a sentencer must be able to consider a defendant's unhappy upbringing, emotional problems and physical abuse as mitigating factors before imposing the death penalty.[31] The Court found that the trial judge only considered the defendant's youth and failed to take into consideration that as a child, the defendant was neglected and physically abused.[32]

G. CONSENSUS FOR IMPOSITION OF DEATH UPON A SHOWING OF RECKLESS INDIFFERENCE TO HUMAN LIFE

In 1987, this Court in *Tison v. Arizona* found a substantial and recent legislative trend among states to impose the death penalty on a defendant for the crime of felony murder absent a finding of intent to kill.[33] This finding was based on the consensus that substantial participation in a felony murder may justify the imposition of death absent a finding of intent to kill.[34] This Court found that a defendant deserved the

30 Id. at 801.

31 455 U.S. 104, 115-116 (1982) (reversing the Oklahoma Supreme Court's decision because the trial judge failed to consider all of the mitigating circumstances.)

32 Id. at 116.

33 481 U.S. at 153-154.

34 Id. at 154 citing *Clines v. State*, 280 Ark. 77, 84 (1983) (armed, forced entry, nighttime robbery of private dwelling known to be occupied plus evidence of killing contemplated; *Deputy v. State*, 500 A.2d 581,

death penalty where he was a major participant in the felony murder that implicitly revealed a reckless indifference to human life.[35] Even in the absence of finding a specific intent to kill, this Court held that Tison deserved the ultimate punishment because engaging in criminal activities known to carry a grave risk of death is a highly culpable mental state.[36]

H. NATIONAL CONSENSUS ANALYSIS ALLOWS THE COURT TO IGNORE PRECEDENT,THE RESPONDENT'S MORAL CULPABILITY, AND MAKE AN ARBITRARY DECISION BASED ON ASSUMPTIONS

The plurality in *Thompson v. Oklahoma* concluded that the execution of a person who was under sixteen at the time of his or her offense constitutes cruel and unusual punishment under the Eighth Amendment.[37] Instead of relying on clear objective standards so that the imposition of death can be

599-600. (Del.1985)(defendant present at scene; robbed victims; conflicting evidence as to participation in killing; cert. pending No 85-6272; *Ruffin v. State*, 420 So.2d 591, 594 (Fla. 1982) (defendant present, assisted co-defendant in kidnapping, raped victim, made no effort to intervene with co-defendant's killing and continued on the joint venture); *People v. Davis*, 95 Ill.2d 1, 52 (defendant present at the scene and had participated in other crimes with Holman, the triggerman, during which Holman had killed under similar circumstances), cert. denied, 464 U.S. 1001 (1983); *Selvage v. State*, 680 S.W.2d 17, 22 (Tex.Cr.App.1984) (participated in jewelry store robbery during the course of which a security guard was killed; no evidence that defendant himself shot the guard but he did fire a weapon at those who gave chase); see also *Allen v. State*, 253 Ga. 390, 395 (1984) (The result in *Enmund v. Florida* turns on how attenuated Enmund's responsibility was for the deaths of the victims in that case.) cert denied, 470 U.S. 1059 (1985).

35 See *Tison v. Arizona*, 481 U.S. at 158 (holding that reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death constitutes a highly culpable mental state.).

36 Id.

37 487 U.S. 815, 838 (1988).

made in a rational manner focusing on the particularized circumstances of the offense and the defendant, the Court made its decision based on the fact that eighteen states require the defendant to be at least sixteen at the time of the offense to merit the death penalty.[38] It failed to recognize that nineteen States authorized capital punishment without setting a minimum age limit and enabled some fifteen-year-olds to be prosecuted as adults.[39] According to Justice O'Connor, "these laws appear to render fifteen-year-olds death eligible, and thus pose a real obstacle to find a consensus."[40] The Court also relied on statistics regarding the behavior of juries that were not dispositive because they did not indicate how many times prosecutors had refrained from seeking the death penalty and how often juries had been asked to impose the death penalty on juveniles.[41] It is well known that punishment should be "directly related to the personal culpability of the criminal defendant."[42] Yet, the Court ignored the moral culpability of the petitioner because it based its decision on its conclusion that all juveniles are less culpable than adults and therefore do not merit the death penalty.[43] By grouping juveniles together as a class, the Court disregarded that the petitioner committed a brutal premeditated murder of his brother-in-law by shooting him twice, cutting his throat, chest and abdomen.[44] Thereafter,

38 Id. at 815.

39 Id. at 816.

40 Id.

41 Id. at 815-816.

42 See *California v. Brown*, 479 U.S. at 545 (O'Connor, J. concurring).

43 See *Thompson* v. Oklahoma, 487 U.S. at 816-817. Justice O'Connor, in her concurrence, noted that just because adolescents are generally less blameworthy than adults who commit similar crimes, that does not necessarily mean they are incapable of being morally culpable to merit the imposition of death.

44 Id. at 819.

the petitioner chained the body to a concrete block and threw it into a river.[45]

The Court in *Thompson v Oklahoma* wrongly assumed that because a teenager is less culpable than an adult, a teenager's execution has no retributive nor deterrence value.[46] This conclusion was not based on any evidence to support it. [47] Rather, the Court's conclusion was based partly on statistics that revealed that a majority of people arrested for willful homicide were over sixteen years of age at the time of the offense.[48] This fact has nothing to do with whether executing a fifteen-year-old furthers the goals of the death penalty. The Court also erroneously based its decision on its assumption that juveniles are incapable of being deterred from committing cold-blooded murder if they knew they would receive the ultimate penalty.[49] At age fifteen, one is quite capable of understanding right from wrong, the consequences of his or her actions, and rationalizing before he or she acts. Therefore, common sense dictates that fifteen-year-olds are capable of being deterred from committing first-degree murder if they know they would receive the ultimate punishment. The Court failed to consider society's moral outrage at petitioner's conduct, the atrociousness of the crime, his moral culpability and the emotions of the victim's family in its decision.

I. LANDMARK CASE DECIDED ARBITRARILY BECAUSE NO OBJECTIVE GUIDELINES EXIST FOR THE COURT TO RATIONALLY

[45] Id.

[46] Id. at 816.

[47] Id at 817.

[48] Id. at 816.

[49] Id. at 816-817. Justice O'Connor, however, acknowledges that not all fifteen-year-olds are incapable of being deterred from committing murder by the prospect of the death penalty.

DECIDE HOW MANY STATES FORM A NATIONAL CONSENSUS

One year after *Thompson*, this Court in *Stanford v. Kentucky* ruled that imposing the death penalty on sixteen and seventeen-year-olds did not constitute cruel and unusual punishment.[50] This conclusion was based on the Court having found that only fifteen states out of 37 decline to impose it on sixteen-year-olds and twelve on seventeen-year-olds.[51] There are no guidelines set forth in the Constitution or in the evolving standards of decency doctrine created by the United States Supreme Court that enable justices to ascertain how many states constitute a national consensus. This enabled the Court in *Stanford* to make its decision based on the justices own subjective conception of what constitutes a national consensus when precedent dictates they conduct a proportionality analysis examining "whether there is a disproportion between the punishment imposed and the defendant's blameworthiness, and whether a punishment makes any measurable contribution to acceptable goals of punishment."[52]

J. A PROPOSAL BASED ON PRECEDENT THAT RESPECTS HUMAN DIGNITY AND REFLECTS MODERN AMERICAN SOCIETY'S NOTION OF DECENCY

Instead of drawing a bright line rule based on the justices' subjective conception of how many states form a national consensus, death penalty jurisprudence evolving out of state legislation dictates this Court adopt the following objective

[50] 492 U.S. 361, 362 (1989).

[51] Id.

[52] Id. at 382. (O'Connor, J concurrence) citing *Thompson* v. *Oklahoma*, 487 U.S. at 853; quoting *Enmund v. Florida*, 458 U.S. at 825.

criteria as federal law.[53] First, the Court should consider whether the defendant knew right from wrong and understood the consequences of his or her actions at the time he or she committed the offense.[54] Second, the Court should determine whether the defendant intended to kill at the time he or she committed the offense or knew that there was a high probability that death would result.[55] Third, the Court should evaluate whether punishment is proportionate to the crime the defendant committed by looking at the nexus

[53] See *Lockett v. Ohio*, 438 U.S. at 602 (the States now deserve the clearest guidance that the Court can provide and that the Court has an obligation to reconcile previous differing views in order to provide that guidance).

[54] Brim, Mitchel A., *The Ultimate Solution to Properly Administer the Ultimate Penalty*, 32 Sw. U. L. Rev. 275 at 305; *M'Naghten's Case*, 8 Eng. Rep. 718-19 (1843) (holding that if the accused did not understand the consequences of his actions nor that it was wrong then he is excused from liability); Wayne R. LaFave, Criminal Law 330-331 (3d. ed. 200) (citing to Model Penal Code Section 4.3 (1994); *Penry v. Lynaugh*, 492 U.S. 302, 322 (1989); See *Enmund v. Florida*, 458 U.S. at 801; *People v. Serravo*, 823 P.2d 128, 136 (1992) (recognizing that under M'Naghten rule judges will hold a defendant liable if he knew that his act was morally wrong even if he did not know it violated a law); *Fisher v. United States*, 328 U.S. 463, 471 (1946); See *Eddings v. Oklahoma*, 455 U.S. at 115-118 (stating that the test for criminal responsibility in Oklahoma is knowing right from wrong).

[55] Brim, Mitchel A., *The Ultimate Solution to Properly Administer the Ultimate Penalty*, 32 Sw. U. L. Rev. 275 at 306; See *Lockett v. Ohio*, 438 U.S. at 608 (invalidating the Ohio capital sentencing statute because it precluded the sentencer from linking the ultimate penalty to one's moral culpability and authorized the imposition of death to someone who did not intend to kill.); See *California v. Brown*, 479 U.S. at 545 (Eighth Amendment's jurisprudence requires consideration of a defendant's character or record and the circumstances of the offense as a constitutionally indispensable part of the process of inflicting the penalty of death.); See *Enmund v. Florida*, 458 U.S. at 798 (requiring a link between the punishment and one's moral culpability); See *Tison v. Arizona*, 481 U.S. at 158 (holding that reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death constitutes a highly culpable mental state that merits the death penalty.).

between the punishment imposed and defendant's blameworthiness.[56] Further, the Court should inquire whether execution furthers the goals of the death penalty. Fourth, the Court should consider all relevant mitigating and aggravating circumstances.[57] In order to impose the death penalty, the Court must find that the aggravating circumstances outweigh the mitigating.[58] The Court should specify what aggravating or mitigating circumstances they are relying on to make its decision.[59] All of these four factors must be found to justify the defendant's execution.[60]

K. PROPOSED STANDARD APPLIED TO SIMMONS

[56] Brim, Mitchel A., *The Ultimate Solution to Properly Administer the Ultimate Penalty*, 32 Sw. U. L. Rev. 275 at 306; See *Stanford v. Kentucky*, 492 U.S. at 363; See *Furman v. Georgia*, 428 U.S. at 304; See *California v. Brown*, 479 U.S. at 541 quoting *Woodson v. North Carolina*, 428 U.S. at 304; See *Lockett v. Ohio*, 438 U.S. at 604 (holding that a sentencer must be permitted to consider any aspect of a defendant's character or record and any circumstances of the offense as a mitigating factor).

[57] See *Gregg v. Georgia*, 428 U.S. at 164 consistent with *Williams v . Oklahoma*, 358 U.S. 576, 585 (1959) (holding that the sentencing judge is authorized, if not required, to consider all of the mitigating and aggravating circumstances involved in the crime.); Ga.Code Ann. s 27-2534.1(b)(Supp.1975); See *Eddings v. Oklahoma*, 455 U.S. at 108-109 (holding that the sentencer should not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record, and any relevant circumstances offered by the defendant);

[58] Brim, Mitchel A., *The Ultimate Solution to Properly Administer the Ultimate Penalty*, 32 Sw. U. L. Rev. 275 at 306.

[59] See *Gregg v. Georgia*, 428 U.S. at 195 (requiring the sentencing authority to specify the factors it relied on to make its decision provides a safeguard to ensure death sentences are not imposed arbitrarily or capriciously.); Ga.Code Ann. s 27-2534.1(c)(Supp.1975).

[60] Brim, Mitchel A., *The Ultimate Solution to Properly Administer the Ultimate Penalty*, 32 Sw. U.L. Rev. 275 at 306.

In applying the proposed standard to the instant case, the Court should consider whether respondent intended to kill. Respondent's intent to kill is evidenced by his statements to his friends that he would "find someone to burglarize, tie the victim up, and ultimately push the victim off the bridge."[61] He planned to kill and in fact told his friends to meet him at a particular location at a particular time to commit murder.[62] Furthermore, respondent deliberated over killing Mrs. Crook when he burglarized her home, taped her hands behind her back, taped her eyes and mouth shut, placed her in the back of the minivan and drove her from her house in Jefferson County to Castlewood State Park in St. Louis County.[63] Respondent's actions - pulling her out of the van, restraining her hands and feet, covering her head with a towel, bounding her hands and feet together with electrical cable, hog-tie fashion, covering her face with electrical tape and then pushing her off the railroad trestle into the river - clearly reveal that he intended to kill her.[64]

The next factor the Court should consider is whether respondent understood the consequences of his actions at the time he committed murder. The respondent understood the consequences of his actions evidenced by the fact he denied any knowledge of the crime because he knew if he told the truth he would serve either jail time or receive the ultimate penalty.[65] His confession along with his statements to his friends showing his motive reveals that he knew and understood that robbing a woman and pushing her off the cliff would kill her.[66] In fact, his belief that his age would allow

61 See *State v. Simmons*, 944 S.W.2d at 169.

62 Id. at 178.

63 Id. at 170.

64 Id.

65 Id. at 173.

66 Id at 169.

him to "get away with it" shows a reckless indifference to human life and knowledge of the consequences of his actions.[67]

Third, the Court should consider whether execution is proportional to the crime the respondent committed. Here, respondent committed a premeditated murder of an innocent woman by taking her out of her home to a park and pushing her off of a cliff when she was terribly afraid of heights.[68] He intended to kill her and did so in a fashion disrespecting her humanity with no remorse.[69] Respondent's execution furthers the goals of the death penalty because it gives him his just dessert and sends a message to other juveniles that if you understand the consequences of your actions and still commit premeditated murder, you will suffer the ultimate price.

The Court should consider all relevant mitigating and aggravating factors. Here, the defense presented the following mitigating factors: respondent being seventeen and arguably unable to think about the future, vote or lawfully drink alcohol.[70] The prosecution presented respondent's age as an aggravating factor implying that he could only get worse.[71] The manner in which respondent killed Mrs. Crook along with his intent to kill are also aggravating factors. It seems that the aggravating circumstances outweigh the mitigating because of the atrociousness of the crime and respondent's moral culpability. Being seventeen years of age at the time of this murder did not prevent him from forming the requisite mental state to merit the death penalty. In fact,

67 Id.

68 Id. at 185.

69 Id. at 176-177.

70 *Simmons v. Roper*, 112 S.W.3d 397, 416 (2003).

71 Id.

his perceived justification for killing Mrs. Crook was that he was going to "get away with it."[72] If he knew that he would have received the ultimate punishment, he would have thought twice about committing murder and an innocent woman's life may have been saved. Punishment needs to be linked to respondent's moral culpability in a society that relies on the judicial system rather than self-help to vindicate their wrongs.[73] Otherwise, people will feel a sense of injustice and rely on vigilante justice or lynch law.[74]

2. PRECEDENT DICTATES THIS COURT BASE ITS DECISION ON RESPONDENT'S MORAL CULPABILITY

The foundation of our judicial system is based on moral culpability. This Court has consistently held that punishment must be directly linked to one's blameworthiness.[75] In fact, "causing harm intentionally must be punished more severely than causing the same harm unintentionally."[76] One of the rationales for imposing the death penalty, deterrence, is linked to moral culpability because it is based on the notion that a person will not form the requisite intent to kill because of the threat of death. In the instant case, respondent likely would not have committed murder if he knew that he would have received the ultimate penalty.

The respondent would like this Court to wrongfully assume that he cannot think about the future nor possess the requisite mental state to merit the ultimate penalty because of his age

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[72] See *State v. Simmons*, 944 S.W.2d at 169.

[73] See *Furman v. Georgia*, 428 U.S. at 308.

[74] Id.

[75] See *California v. Brown*, 479 U.S. at 545; See *Lockett v. Ohio*, 438 U.S. at 608 (invalidating the Ohio statute because it prevents the sentencer to consider the absence of intent to kill as a mitigating factor).

[76] See *Enmund v. Florida*, 458 U.S. at 798 citing H. Hart, *Punishment and Responsibility* 162 (1968).

and inability to vote or lawfully drink alcohol.[77] However, it is evident by respondent's actions, confession, and statement to his friend that he would "get away with it" that he did possess the requisite mental state to merit the death penalty and further was able to rationalize that he would escape the consequences of his actions.[78]

3. SOCIETY DEEMS RESPONDENT'S EXECUTION ACCEPTABLE EVIDENCED BY THE RECENT TREND OF IMPOSING THE DEATH PENALTY ON THOSE WHO MERELY APPRECIATE THE HIGH RISK OF DEATH AND DO NOT COMMIT THE ACT OF MURDER

This Court acknowledged in *Tison v. Arizona*, that a societal consensus exists to impose the death penalty on one who did not kill nor intend to kill but was merely a major participant in a felony murder.[79] The rationale for this decision was that actively participating in a felony murder shows a reckless disregard for human life; a highly culpable mental state meriting the death penalty.[80]

Intending to kill and following through with that intention is a higher culpable mental state than participating in an act that shows a reckless disregard for human life. Therefore, society deems it acceptable to execute a seventeen-year-old who committed an act of murder, intended to kill and rationalized that he would escape the ultimate punishment for his actions because of his age.[81]

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[77] See *Simmons v. Roper*, 112 S.W.3d 397 at 416.

[78] See *State v. Simmons*, 944 S.W.2d at 169-173.

[79] 481 U.S. at 138-144.

[80] Id.

[81] See *State v. Simmons*, 944 S.W.2d at 169-173.

This Court has consistently held that intentional harm must be punished more severely than unintentional harm.[82] In *Tison*, the petitioner did not specifically intend to kill the victims nor did he kill them.[83] In contrast, the respondent in the instant case had the specific intent to kill and did in fact kill the victim.[84] In *Tison*, the petitioner was executed.[85] Therefore, the respondent in the instant case should be executed.

The instant case exemplifies both the importance of the death penalty in society and the justification for its existence. In the instant case, the respondent was not deterred from committing murder because he knew his age would prevent him from receiving the ultimate punishment.[86] This implies that had respondent known he would have received the ultimate penalty he would not have committed the act of murder.

4. COURT SHOULD NOT DRAW A BRIGHT LINE RULE BASED ON AGE BECAUSE AGE IS NOT DETERMINATIVE OF ONE'S MORAL CULPABILITY

This Court is being asked to draw a bright line rule at an arbitrary age of eighteen. The Court should not draw a bright line rule at the arbitrary age of eighteen because age does not define one's character, judgment, maturity, personal respon-

82 See *Enmund v. Florida*, 458 U.S. at 798 citing H. Hart, *Punishment and Responsibility* 162 (1968); See *Lockett v Ohio*, 438 U.S. at 605; See *California v. Brown*, 479 U.S. at 545; See *Tison v. Arizona*, 481 U.S. at 156.

83 481 U.S. at 138. (O'Connor, J. concurring).

84 See *State v. Simmons*, 944 S.W.2d at 169.

85 481 U.S. at 158.

86 Id.

sibility or moral guilt.[87] In fact, drawing a bright line based on age "treats all persons convicted of a designated offense not as uniquely individual human beings, but as members of a faceless, undifferentiated mass."[88] Furthermore, it violates a fundamental principle underlying the Eighth Amendment. Respect for humanity requires "consideration of the character and record of the individual offender and the circumstances of the particular offense" before deciding whether one merits the ultimate penalty.[89]

5. THIS COURT HAS CONSISTENTLY HELD THAT INDIVIDUAL CONSIDERATION IS A CONSTITUTIONAL REQUIREMENT AND THEREFORE SHOULD ANALYZE JUVENILE EXECUTIONS ON A CASE-BY-CASE BASIS

This Court and a majority of state legislatures have held that individual consideration is a constitutional requirement before sentencing one to death.[90] This Court needs to abide by this precedent and not group juveniles together as a class but rather recognize that each juvenile defendant is different with respect to their maturity, intelligence, capabilities, life experiences, personal responsibility, and moral guilt. This Court should uphold Justice O'Conner's ruling in *Thompson* in which she stated "granting the premise that adolescents are generally less blameworthy than adults who commit similar crimes, it does not necessarily follow that all fifteen-year-olds are incapable of the moral culpability that would justify

87 Hoffman, Joseph L. *ON THE PERILS OF LINE-DRAWING: JUVENILES AND THE DEATH PENALTY*, Hastings Law Journal January, 1989, p. 258.

88 See *Woodson v. North Carolina*, 428 U.S. at 304.

89 Id.

90 See *Enmund v. Florida*, 458 U.S. at 792 (quoting *Lockett v. Ohio*, 438 U.S. at 605); See *Stanford v. Kentucky*, 492 U.S. at 362; See *Eddings v. Oklahoma*, 455 U.S. at 115-116.

the imposition of capital punishment."[91] Juveniles can form the requisite intent to kill, and are able to both understand the consequences of their actions and conform their conduct to civilized standards.[92] In fact, juveniles are mature enough to understand and know that murdering another person is wrong.[93]

Fifteen, sixteen, and seventeen-year-olds can possess the requisite mental state to merit the ultimate penalty. However, it is essential to look at the merits of each individual case as a constitutional requirement.[94] In *Thompson v. Oklahoma*, a fifteen-year-old brutally murdered his brother in law.[95] The petitioner shot his brother in law twice, cut his throat, chest, abdomen, and broke his leg.[96] Thereafter, he chained the body to a concrete block and threw it into a river where it remained for approximately four weeks.[97] In *Wilkins v. Missouri*, a sixteen-year-old planned to rob a store and "murder whoever was behind the counter because a dead person can't talk."[98] Wilkins carried out his plan by stabbing a victim a total of eight times.[99] The victim was stabbed once causing him to fall and then three times in the chest, and four more times in the neck after pleading for his life.[100]

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91 See *Thompson v. Oklahoma*, 487 U.S. at 817.

92 See *Stanford v. Kentucky*, 492 U.S. at 374.

93 Id.

94 See *Lockett v. Ohio*, 438 U.S. at 605; See *Stanford v. Kentucky*, 492 U.S. at 375.

95 487 U.S. at 819.

96 Id.

97 Id.

98 492 U.S. at 366.

99 Id.

100 Id.

Wilkins left the scene, leaving the victim to die on the floor.[101] In *Stanford v. Kentucky*, a seventeen-year-old repeatedly raped and sodomized a victim during and after the commission of a robbery at a gas station where the victim had worked.[102] The victim was driven to a secluded area where Stanford shot her in the face and in the back of her head.[103] Stanford knew the victim and killed her because he was afraid she would identify him.[104] In all of the three cases mentioned above, each petitioner knew what he was doing, each intended to kill, and each made the conscious decision to follow through with his intention, showing no remorse. Ultimately, each one possessed the requisite moral culpability to merit the death penalty irrespective of their age.

Not all seventeen-year-olds are alike. In contrast to *Stanford*, the Sniper case illustrates a seventeen-year-old who did not deserve the ultimate punishment because of his mental state and poor upbringing.[105] Lee Malvo was abandoned by his mother, and was in search for someone to provide guidance in his life.[106] The jurors believed that Lee Malvo was influenced and brainwashed by John Allen Muhammed to commit the various murders.[107] Therefore, he was found not to possess the moral culpability to merit the ultimate punishment because he was not fully responsible for his actions.

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101 Id.

102 Id at 365.

103 Id.

104 Id.

105 Mark Wilson, *Convicted Sniper Lee Boyd Malvo Sentenced to Life*, USA Today, March 10, 2004; http: www.usatoday.com/news/nation/2004-03-10_malvo_x.htm (last visited April 11, 2004).

106 Id.

107 Id.

6. THE COURT'S USE OF A NATIONAL CONSENSUS ANALYSIS IS INHERENTLY ARBITRARY, VIOLATES PRECEDENT, AND IGNORES THE FOUNDATION UPON WHICH THE JUDICIAL SYSTEM IS BASED

As a result of not relying on an objective standard to base its decision, this Court's use of a national consensus analysis to decide whether one deserves the ultimate punishment is inherently arbitrary for the following reasons. First, this Court is inconsistent in its analysis of whether a national consensus exists among juveniles and the mentally retarded. For example, in *Thompson*, this Court only considered the number of states that explicitly set a minimum age prohibiting a juvenile from execution because it assumed those are the only states that considered a minimum age for execution.[108] Yet, in *Atkins v. Virginia*, this Court found the absence of state legislation authorizing the execution of the mentally retarded to be "powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal."[109] Furthermore, this Court considered the fourteen states that rejected capital punishment completely, in its analysis.[110]

Second, this Court must arbitrarily decide whether to include those states that prohibit capital punishment completely in its analysis. There is no objective guidance for this Court to rely on to make its decision. Nowhere in the Constitution does it state that the issue of what constitutes cruel and unusual punishment is dependent upon the Court's

[108] See *Thompson v. Oklahoma*, 487 U.S. at 815; Brim, Mitchel A., *The Ultimate Solution to Properly Administer the Ultimate Penalty*, 32 Sw. U. L. Rev. at 299.

[109] 536 U.S. 304, 315-316 (2002); Brim, Mitchel A., *The Ultimate Solution to Properly Administer the Ultimate Penalty*, 32 Sw. U. L. Rev. at 299.

[110] 536 U.S. at 314.

determination of whether to include those states that prohibit capital punishment completely in its analysis.

Third, this Court must arbitrarily decide how many states constitute a national consensus. There is no objective guidance for this Court to rely on to make its decision. Rather, it's the subjective determination of the justices that ultimately determines how many states form a national consensus. This contradicts the purposes behind the evolving standards of decency doctrine because the decision is not based on what society deems acceptable, but rather what the justices deem appropriate.[111]

Fourth, this Court contradicts itself by considering certain evidence in one landmark case and not in another. In *Thompson*, this Court considered respected professional organizations and beliefs of other nations such as Anglo-American heritage and Western European community in its analysis.[112] Yet, in *Stanford*, eleven years later, the Court did not consider such evidence.[113]

Fifth, this Court contradicts itself by interpreting the same evidence concerning the frequency of juvenile executions differently in two landmark decisions. In *Stanford*, this Court found the fact that "actual executions for crimes committed under age 18 accounted for only about two percent of the total number of executions that occurred between 1642 and 1986" to be insignificant.[114] Yet, eleven years earlier, this Court in *Thompson* found it significant that no execution of anyone under the age of sixteen had taken

[111] Brim, Mitchel A., *The Ultimate Solution to Properly Administer The Ultimate Penalty*, 32 Sw. U. L. Rev. at 303.

[112] 487 U.S. at 815.

[113] 492 U.S. at 370-380.

[114] Id. at 373-374.

place since 1948 despite the prosecution having tried thousands of murder cases.[115]

This Court not only interpreted statistics regarding the frequency of juvenile executions differently in two landmark cases but also interpreted what evidence is relevant to ascertain a juvenile's responsibility differently in *Thompson* and *Stanford*. For instance, in *Thompson*, this Court relied on a juvenile being less blameworthy than an adult because he or she is "less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult."[116] In fact, this Court in *Atkins* relied on the same evidence to conclude that it is unconstitutional to execute the mentally retarded.[117] Yet, in *Stanford* this Court disregarded petitioner's argument that seventeen and eighteen-year-olds cannot be held fully responsible for their actions.[118]

This Court contradicts itself by imposing its own judgment in one landmark case concerning capital punishment and not in another. For instance, in *Stanford*, this Court rejected the petitioner's argument that the issues in the case permit the Court to apply its "own informed judgment."[119] However, in *Atkins* this Court relied on its own independent evaluation in its analysis of whether executing the mentally retarded was constitutional.[120]

This Court ignores its own precedent with respect to what a sentencer must consider before deciding whether a juvenile

115 487 U.S. at 815-816.

116 Id. at 816.

117 536 U.S. at 320.

118 492 U.S. at 376.

119 Id. at 378.

120 536 U.S. at 321.

merits the ultimate penalty. In *Woodson*, this Court held that before a defendant can be sentenced to death, the sentencer must consider the "character and record of the individual offender and the circumstances of the particular offense."[121] However, the Court in *Thompson* failed to consider the individual character of the offender because it assumed all fifteen-year-olds are exactly the same with respect to their lesser culpability. Furthermore, this Court disregarded the atrociousness of petitioner's premeditated murder of his brother-in-law because it did not use the facts of the case as a basis for its determination.[122]

This Court has also ignored its own precedent with respect to linking punishment to one's moral culpability. It is well established that punishment should be directly linked to one's moral culpability.[123] In *Thompson*, the plurality gave the petitioner life imprisonment because it grouped juveniles under the age of fifteen together as a class and assumed that since they were less culpable than adults, they did not merit the ultimate penalty. This analysis enabled the Court to ignore the petitioner's moral culpability. The heinous acts of petitioner clearly reveal his culpable mental state. He shot his brother-in-law, Charles Keene, twice, cut his throat, chest and abdomen.[124] Subsequently, he chained Mr. Keene's body to a concrete block and threw it into the river.[125] In fact, the Medical Examiner of Oklahoma also found that Mr. Keene had been beaten which is consistent with testimony from a witness indicating petitioner kicked Mr. Keene in the

121 428 U.S. at 304.

122 487 U.S. at 815-817.

123 See *California v. Brown*, 479 U.S. at 545; See *Lockett v. Ohio*, 438 U.S. at 604;

124 See *Thompson v. Oklahoma*, 487 U.S. at 819.

125 Id.

head.[126] The petitioner cut Mr. Keene "so the fish could eat his body."[127] Yet, the plurality sentenced him to life imprisonment because he was arguably less culpable than an adult.[128] However, evidenced by his actions and statement, the petitioner possessed the moral culpability to merit the death penalty.

The evolving standards of decency doctrine underlying this Court's national consensus analysis, prevents the purpose for which it was enacted. The evolving standards of decency doctrine was created so this Court could interpret the Eighth Amendment in a flexible manner as to reflect what society deems acceptable.[129] However, this Court is drawing a bright line rule based on its subjective interpretation of how many states form a national consensus.[130] As Justice Scalia stated, "the country can't go back" once the Court makes its decision.[131]

CONCLUSION

This Court should not rely on a national consensus analysis because it violates stare decisis, ignores the foundation upon which the judicial system is based, and is inherently arbitrary. Relying on a national consensus analysis is arbitrary for the following reasons. First, there are no objective guidelines informing the justices whether to include the

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126 Id. at 860-861.

127 Id. at 861.

128 Id. at 816.

129 *Penry v. Lynaugh*, 492 U.S. 302, 330-331 (1989).

130 Brim, Mitchel A., *The Ultimate Solution to Properly Administer the Ultimate Penalty*, 32 Sw. U. L. Rev. at 303.

131 Id.; Bureau of National Affairs, Inc., The United States Law Week, ORAL ARGUMENT: THE COURT WEIGHS EXECUTION OF MENTALLY RETARDED PRISONERS, Washington D.C. 20037, Vol. 70, No. 33, p. 3544 (March 5, 2002).

twelve states that prohibit capital punishment in their analysis. Second, the justices must subjectively decide how many states form a national consensus because no objective guidelines exist. Third, the Court must arbitrarily decide what evidence to rely on in making its decision. Fourth, it allows the Court to base its decision on an erroneous assumption that all juveniles under the age of eighteen do not possess the requisite mental state to merit the death penalty. It does this by ignoring precedent that requires "consideration of the character and record of the individual offender and the circumstances of the particular offense" before deciding whether one merits the ultimate penalty.[132] Furthermore, precedent requires a proportionality analysis to ensure that the punishment is not disproportionate to the crime.[133]

Instead of grouping juveniles together as a class and drawing a bright line rule based on age, this Court should look at juveniles individually and respect them as human beings with unique characteristics, life experiences, personal responsibility and moral blameworthiness. Like in *Furman*, this Court is urged to commit error by concluding that anyone under the age of eighteen is incapable of possessing the requisite mental state to merit the death penalty.[134] This would be a grave injustice to not only the victim, the victim's family, but also to society as a whole because the Court would ignore respondent's moral culpability.[135]

An issue of this magnitude should not be based on whether the justices decide to include the 12 states that do not authorize capital punishment in their national consensus analysis.

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132 See *Woodson v. North Carolina*, 428 U.S. at 304.

133 See *Gregg v. Georgia*, 428 U.S. at 198; See *Thompson v. Oklahoma*, 492 U.S. at 363 (O'Connor, J concurrence).

134 408 U.S. at 386.

135 See *State v. Simmons*, 944 S.W.2d at 169.

Rather, it should be based on clear objective criteria, the proposed standard, which has evolved out of state legislation and can carefully and adequately aid sentencers to make a rational decision. This Court has consistently stated that it has an obligation to provide the states with the clearest guidance possible.[136] The time has come for the Court to fulfill its obligation by setting an example for the states and administering the ultimate penalty in a consistent and rational manner. The only way for this Court to achieve this is to adopt the proposed standard as federal law and apply it to the instant case. Furthermore, this Court should require the states that authorize capital punishment to apply it on a case-by-case basis focusing on the individual's moral culpability. It is unthinkable to follow any other course in a judicial system that relies on precedent and fixed rules of law.[137] By applying the proposed standard, the Court respects a person's pride and dignity whose life has been shattered as a result of one's selfish decision to kill.[138]

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[136] See *Lockett v. Ohio*, 438 U.S. at 602.

[137] See *Gregg v. Georgia*, 428 U.S. at 193.

[138] Brim, Mitchel A., *The Ultimate Solution to Properly Administer the Ultimate Penalty*, 32 Sw. U. L. Rev. at 316.